Linklaters

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FNZ / GBST

GBST comments on FNZ Response to the Remedies Paper

1 Introduction and Summary

1.1 This submission is made by GBST Holdings Limited ("**GBST**") in response to FNZ's Response to the CMA's Remedies Paper dated 30 April 2021 (the "**FNZ Submission**") and also addresses some of the points raised in FNZ's response to GBST's submission on the CMA's Remedies Paper of 12 May 2021 (the "**Supplementary FNZ Submission**").

1.2 The FNZ Submission illuminates concerns that GBST has previously raised with respect to Remedies Paper Option B (and which GBST's proposed alternatives for a reverse carve-out mitigate).

1.3 In its Remedies Paper, the CMA had rejected FNZ's Option A as ineffective, on the basis that FNZ would be GBST's owner during implementation of the separation of the existing integrated GBST business. The CMA was concerned that FNZ "*has no incentive to create a strong competitor*"[1].

1.4 Option B is notionally distinguishable from Option A in that, technically, FNZ would no longer own GBST at implementation of separation. However, as pointed out at the Response Hearing and in GBST's Remedies Paper Response, there are two critical junctures that carry risks as to remedial effectiveness, not one. The first, and arguably more fundamental, is in drawing up the plan -- negotiating the asset perimeters and separation plan -- in the first place. The amended proposal in the FNZ Submission does not give the purchaser sufficient control over the scope of the carve-out as it needs to be agreed prior to the purchaser having ownership of GBST.

1.5 In terms of substantive risk profile, therefore, the differences between FNZ's Option B and Option A are negligible. This is particularly the case due to FNZ's intention that there will be a "*short*" period between "Global Completion" (sale of all of GBST to the purchaser) and "completion of the buy-back" and given that FNZ suggests that it intends to reserve a minimum of core IP to itself (which will never be available to the purchaser despite the purchaser's technical ownership for a "short" period of time)[2]. The brief interlude will not materially assist the purchaser in determining whether the scope of the carve-out enables it to effectively operate GWM. Instead, the purchaser will be locked into any mistakes, compromises or unintended consequences agreed with FNZ before it was owner/operator of the existing GBST business.

1.6 The FNZ Submission illuminates and reinforce these concerns. In particular:

1.6.1 although FNZ suggests that "*only modest refinements are required to ensure the success of the Buy Back Remedy*",[3] FNZ proceeds to identify "*a list of core proprietary IP that FNZ would need to retain following the Buy Back Remedy*",[4] [✂].

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[1] Remedies Paper, para. 1.126(c).

[2] FNZ Submission, para. 3.18. Although confusingly FNZ also says that it will "retain" the core IP which suggests it will never transfer to the Purchaser: FNZ Response to Remedies Paper, para 2.2-2.3.

[3] FNZ Submission, para. 4.

[4] FNZ Submission, para. 4.2.

1.6.2 another of the "refinements" proposed by FNZ is to permit FNZ to commence separation planning and preparation of the reverse carve-out as soon as possible. This increases the risks associated with the reverse carve-out as it could undermine negotiations with and due diligence by potential purchasers because FNZ would be able to access GBST's confidential information and influence the process before the purchaser is allowed to assess the separation risks.

1.7 FNZ's proposal regarding the mandate of the Divestiture Trustee introduces further unnecessary risk. As indicated by GBST in GBST's Response to the Remedies Paper, if a remedy package comprising the reverse carve-out remedy cannot proceed to the CMA's satisfaction during the initial divestiture period and a Divestiture Trustee is appointed, then the sale must comprise an alternative divestiture package of a full divestment of GBST in order to mitigate further delay and disruption to the GBST business.

1.8 Regarding potential purchasers, expressions of interest for GBST *as a whole* are not the same as an expression of interest in assuming the risk at both critical junctures: (i) misjudgements in agreeing a legally binding asset allocation and separation plan and (ii) implementation of that binding plan.

1.9 In contrast, under GBST's alternative buy-back proposals -- offered without prejudice to its view that full divestiture is the only highly certain effective remedy -- FNZ *will* end up the owner of a Capital Markets business either definitively (option 1) or at the purchaser's option (option 2). FNZ will simply have to wait a short number of months longer while the purchaser de-risks the remedy for itself, for GWM and Capital Markets customers, and further to the CMA's remedial objectives, as the owner/operator of all of GBST.

1.10 GBST is available to discuss this response and its views on the remedy proposals and mitigation options more broadly with the CMA.

2 FNZ's preferred vision injects into Option B virtually all of the same remedial risk problems as Option A

Remedies Paper Option A vs. B

2.1 The CMA's Remedies Paper provisionally took the view that FNZ's proposed Option B was an effective remedy[5] while FNZ's Option A was not.[6] In reaching these opposite conclusions on effectiveness, the CMA noted that:

> *A key difference between Options A and B is who owns GBST at the time the separation of the two divisions takes place and thus who formally controls and oversees that process. Under Option A this will be FNZ, under Option B this will be the purchaser as they acquire the entire GBST business prior to any buy back. We consider this makes Option A materially riskier than Option B.*[7]

2.2 In essence, Option A was provisionally ruled to be unacceptably risky by the CMA because if FNZ was permitted still to be the owner of GBST at the time of separation, it could influence how the CM asset carve-out is implemented to suit its strategic ends as a close competitor

[5] Remedies Paper, para. 1.200.

[6] Remedies Paper, para. 1.179.

[7] Remedies Paper, para. 1.177.

to the GWM business, and weaken that business as part of the carve-out and sale to the purchaser.[8]

2.3 Conversely, the CMA endorsed Option B as provisionally effective because the purchaser would own all of GBST at the time the carve-up of GBST was implemented, such that it was truly a *sell-back* of CM assets, and not FNZ *retaining* the CMA assets all along. The premise of this provisional acceptance was that if the purchaser is the owner at the time of implementation of the separation / carve-out / buy-back, the risks under Option A can safely be avoided.

FNZ frequently blurs Options A and B in its response

2.4 In light of the CMA's rejection of Option A, the FNZ Submission seeks to comment on only provisionally effective Option B, but in a number of places it blends Options A and B terminology together. For example, it opens by saying:

> *Under the Buy Back Remedy, FNZ would retain … the following core CM assets … All other assets … can be acquired, at the purchaser's option*.[9]

2.5 Elsewhere it also refers to "*the purchaser will be acquiring a smaller proportion of … GBST … under the Buy Back Remedy than in the context of an outright sale*".[10]

2.6 These statements do not imply an outright sale whereby the purchaser owns all of GBST prior to separation, and then sells back certain CM assets. In both substance and in form, they correspond to a partial divestiture: FNZ owns all of GBST; it retains "core" Capital Markets assets; only residual Capital Markets assets are available to the Purchaser (in a competitive process) and carves-out only the GWM assets to sell to a purchaser. As such, this interpretation would retain all the concerns that led the CMA provisionally to reject Option A.

2.7 The FNZ Submission frequently blurs Options A and B because under its preferred outcome, Option B is only technically different (i.e. purchaser owns GBST at time of buy-back completion). Substantively, Option B as proposed by FNZ is not materially different from Option A, as under both scenarios the legally binding agreement to separate GBST's assets occurs while FNZ owns GBST.

FNZ's Option B is effectively no different from Option A and therefore has an equal risk profile

2.8 In some paragraphs, the FNZ Submission states that there would (first) be a sale of all of GBST to the purchaser, also known as Global Completion, prior to the break-up of GBST. At paragraph 3.17, FNZ says:

> *the time period between Global Completion and completion of the buy-back … will in any event be short.*[11]

2.9 This technically corresponds to a full sale and buy-back with two completions that are staggered and not simultaneous. That is, the purchaser will own all of GBST for more than "*a legal instant*" – albeit not for very long, because the gap in time between the two completions will be "*short*". However, the risk profile remains the same as if FNZ was owner

[8] Remedies Paper, para. 1.179.

[9] FNZ Submission, para 2.2-2.3.

[10] FNZ Submission, para 3.17.

[11] FNZ Submission, para 3.18.

all along at the time of separation (which the CMA found fatal to the effectiveness of Option A). This is because the purchaser has had to negotiate a legally binding definitive separation plan and asset lists reflecting the carve-up:

- while FNZ is still the owner of all of GBST;
- where FNZ has reserved certain "core" assets to itself before the process even begins (as to which see Section 3 below); and
- before the purchaser obtains owner/operator access both to GBST management and its technology and SMEs to gain unpressured insight into the details about how GBST can safely be carved up without undue risk of weakening the GWM business and the CM business.

2.10 As noted in GBST's Response Hearing and Response to the CMA's Remedies Paper, even with standard due diligence and good faith on all sides, this intended process is likely to lead to mistakes, compromises and unintended consequences due to competitive tension (with other bidders), deal negotiation pressure (with FNZ) and under tight deadlines (imposed for good reason by the CMA).

The purchaser will not have discretion to determine exactly what it needs for the GWM business

2.11 Furthermore, the FNZ Submission affirms the conflict previously highlighted between:

2.11.1 on the one hand, FNZ's previous submission that the purchaser will have discretion to determine the scope of the assets necessary for an effective divestment of the GWM business (as a result of which it would be able to "*compete independently and effectively*" immediately following completion and service Wealth Management customers "*without disruption – to the same standards, with the same staff and infrastructure*"[12]); and

2.11.2 on the other, FNZ's parallel requirement to have the right to buy-back certain "non-negotiable" assets, which are defined at the outset of the remedy process.

2.12 In particular, FNZ has identified, by way of "refinements and clarifications" to its proposal, a list of core proprietary Capital Markets software that it intends to retain following the reverse carve-out remedy: [✂]. At paragraph 4.3-4.4 of the FNZ Submission, FNZ suggests that, even if the core IP underlying this software is shared with the Wealth Management business (which it is, in some instances), FNZ will acquire the legal title to the software as part of the buy-back. This approach is inconsistent with the suggestion that the proposed buy-back remedy would allow the purchaser flexibility to retain the necessary assets to run a successful Wealth Management business[13], and therefore effectively address the SLC provisionally identified by the CMA.

2.13 FNZ also places the onus on the CMA to identify which IP is shared between GBST's divisions. FNZ has suggested that the CMA must delineate between "*generic and commoditised IP (easily replaceable by FNZ)*"[14] and other IP that is core to Capital Markets products. This would require the CMA to investigate in detail the IP interdependencies between GBST's divisions in order to conclude on the effectiveness of the remedy. Aside

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[12] FNZ Submission, para 1.2(A).

[13] See e.g. FNZ Submission, para 3.16 "*the purchaser will receive all assets required to run the GWM business independently and effectively*".

[14] FNZ Submission, para 4.4.

from the fact that the CMA is under no such obligation in order to assess the effectiveness of a remedy, this further underlines the composition risks that GBST has identified. The CMA should only accept a remedy that is sufficiently clear-cut and easily identifiable to effectively address the SLC.

The alternative options and safeguards proposed by GBST are not "uncommercial" and do not generate "significant additional risks"

2.14 Without prejudice to the fact that GBST continues to favour the full divestiture of all of GBST as an existing business as the most effective and risk-free remedy proposal, the alternative options and safeguards proposed by GBST are designed to mitigate the risks associated with Option B. While FNZ claims that GBST's alternative remedy proposals are "*uncommercial and generate significant additional risks*",[15] in fact those alternative proposals are designed to engage constructively with the remedy proposal as set out in the Remedies Paper and to attempt to minimise the disruption and risks to GBST's business.

2.15 FNZ's assertion that GBST's proposals are "*uncommercial*" or "*would give rise to commercial uncertainty*" are misplaced. The point of the proposed safeguards is to give the purchaser time to assess the GBST business and the separation risks, without heightened deal negotiation pressure and, therefore, to make an informed commercial decision on the appropriate asset perimeter. FNZ's view that this may be "*uncommercial*" is not a consideration that goes to the effectiveness of the remedy.

2.16 It is also not credible for FNZ to say that the remedy package proposed by GBST "*would not be attractive for potential purchasers*."[16] On the contrary, and unlike FNZ's proposal, control over any terms and conditions of the separation would be with the purchaser, which would render the remedy proposal highly attractive.

3 FNZ continues to underestimate the interdependencies between the GWM and CM businesses

3.1 FNZ claims in the FNZ Supplementary Submission that GBST has "*failed to provide any credible evidence of the 'complexities and interdependencies' (para 5.7) which are alleged to exist between its global wealth management (GWM) and capital markets (CM) businesses.*"[17] This is incorrect. GBST has set out in detail in numerous submissions and responses provided to the CMA the interdependencies that exist in relation to, [✂].

3.2 GBST has been engaging with the CMA regarding the interdependencies in its business since the CMA published the Notice of Possible Remedies during the Phase 2 investigation. By way of example, GBST's response to the NPR provides a detailed overview of how GBST's business operates and the interdependencies therein.[18] This is factual information – GBST has operated as a single company for over 13 years and its business divisions are naturally integrated as a result. GBST has also responded to all information requests from the CMA and provided all relevant information and documents requested by the CMA to support statements made by GBST.

3.3 FNZ refutes GBST's claims that FNZ has no better knowledge of GBST's business than any other competitor or customer by asserting that this "*ignores the familiarity FNZ has*

[15] FNZ Supplementary Submission, para. 3.

[16] FNZ Supplementary Submission, para. 3.5.

[17] FNZ Supplementary Submission, para. 1.1.

[18] GBST Response to NPR, 14 August 2020, see e.g. paragraphs 2.1-2.8 and 4.8.

developed with GBST and its products through its transactional due diligence process, post-closing integration planning workshops…"[19] As GBST has repeatedly made clear, FNZ [✂]. It is simply not credible that FNZ could understand the complexities and interdependencies of GBST's business based on the limited amount of information it had access to during this short period of time.

3.4 Further, [✂].

4 FNZ continues to underestimate the likely burden on GBST management / disruption to customers

4.1 FNZ maintains that "*GBST's resources will not be diverted in any material way from running the GWM business in order to implement the Buy Back Remedy*",[20] on the basis that third party consultants would be appointed to support the separation process. FNZ also claims that "*the Buy Back Remedy would not be materially more burdensome for GBST staff than a full sale – the Buy Back Remedy would, for example, require less extensive due diligence than a full sale (due to the narrower asset perimeter) to offset the additional (but still, in FNZ's view, limited) separation work*".[21]

4.2 These assertions are misplaced. A share sale of the entire business would be straightforward to execute following a standard due diligence process. By contrast, the proposed separation will require significant work to assess and resolve the interdependencies between the two businesses.

4.3 While external consultants may assume some of the burden associated with a separation exercise, they will necessarily be dependent on [✂], to provide the detailed underlying information that will be needed to assess, design and implement any separation plan, [✂]. Such concerns have already been raised directly by customers, as discussed in GBST's previous submissions.

5 FNZ's proposal regarding the mandate of the Divestiture Trustee introduces further unnecessary risk

5.1 FNZ has suggested that, contrary to the CMA's indications in the Remedies Paper,[22] in the event that a Divestiture Trustee were required, they should be "*in the first instance required to pursue the Buy Back Remedy*."[23] As indicated by GBST in the GBST Response, if a remedy package comprising the reverse carve-out remedy cannot proceed to the CMA's satisfaction during the initial divestiture period and a Divestiture Trustee is appointed, then the sale must comprise an alternative divestiture package of a full divestment of GBST in order to mitigate further delay and disruption to the GBST business.

5.2 Divestiture Trustees provide a fall-back for the CMA "*to sell the divestiture package (or greater if necessary) at no minimum price in the event that the parties do not achieve a sale within the stated divestment period*".[24] It is therefore crucial that any sale by a Divestiture Trustee relates to the least risky and most clear-cut divestment package, and the Remedies

[19] FNZ Supplementary Submission, para. 2.20.

[20] FNZ Submission, para 3.11(A).

[21] FNZ Submission, para 3.11(A).

[22] Cf. paras 1.193 to 1.194.

[23] FNZ Submission, para 4.12.

[24] Remedies Guidance, para 5.28.

Guidance provides that "*the CMA may require that, in the event that the merger parties' preferred divestiture does not proceed to its satisfaction within the timescales set out in the UILs, Final Undertakings or Final Order, a divestiture trustee may be appointed to ensure the sale of an alternative package*."[25]

5.3 One reason FNZ cites in favour of its position that a Divestiture Trustee should first attempt to pursue the reverse carve-out remedy involves [✄]. FNZ alleges [✄].[26] These allegations are unfounded. [✄].

5.4 [✄].

6 Conclusion

6.1 The proposals in the FNZ Submission highlight a number of issues and risks associated with the reverse carve-out remedy. FNZ's further "refinements" and comments on this remedy proposal confirm GBST's submissions that the remedy is in reality a partial divestment with an unacceptable risk profile.

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25 Remedies Guidance, paragraph 5.18.

26 FNZ Submission, para 4.13.